IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as *Amicus Curiae* supporting the petitioners,

Great American Federal Savings & Loan Association ("Association"), *et al*, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and 42 U.S.C. § 1985(3), as applied by the Court below, as well as other equal employment statutes and regulations. Most of EEAC's member representatives—many of whom are corporate officers—are charged with corporate responsibility for compliance with the various federal, state and local statutes, regulations and orders dealing with equal employment opportunity. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether the Third Circuit erred in holding that 42 U.S.C. § 1985(3) may be construed to apply to an alleged conspiracy among officers and directors of a single corporation to violate Title VII.

3. Because of its interest in issues pertaining to equal employment, on several other occasions, EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae*. See, e.g., *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S. L.W. 4966 (1978); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Gardner* v. *Westinghouse Broadcasting Company*, 46 U.S.L.W. 4761 (1978); and *Shell Oil Company* v. *Anne M. Dartt*, 434 U.S. 98 (1977).

4. EEAC also has filed briefs as *Amicus Curiae* with the consent of the parties in a number of other recent cases raising important equal employment issues. See, e.g., *The Regents of the University of California* v. *Allan Bakke*, 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted* (involves 42 U.S.C. § 1981); *Kaiser Aluminum & Chemical Corporation* v. *Weber* (No. 78-435), *petition for cert. pending*; *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

5. The movant, EEAC, and its members, have broad knowledge concerning the practical and legal application of the statutes and related issues involved in this case. Because of this knowledge and its extensive experience as *amicus curiae* in other civil rights cases, the *Amicus* is well situated to brief this Court on the practical as well as legal implications of the issues presented by the decision below.

6. The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. On November 3, 1978, counsel for respondent informed the undersigned that he would forward a letter stating that he had no objection to the filing of this brief. As this letter has not yet been received, however, this motion is required under Supreme Court Rule 42.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by Great American Federal Savings & Loan Association, *et al* ("Association").

STATEMENT OF THE CASE

Respondent John R. Novotny initiated this suit under 42 U.S.C. § 1985(3) and Section 704(a) of Title VII, alleging that Petitioner Great American Federal Savings & Loan Association and the individual Petitioners, its officers and directors, terminated him from his position as an officer of the Association because of his efforts to secure equal employment opportunities on behalf of female employees of the Association. Novotny also alleged that the individual petitioners had intentionally and deliberately embarked upon a course of conduct the effect of which was to deny female employees equal employment opportunity.

The district court, dismissed the complaint in its entirety. The alleged cause of action under 42 U.S.C. § 1985(3) was dismissed because the complaint stated that "at all times relevant hereto, the individual defendants were and are acting on behalf of GAF." Complaint, ¶ 33. The court held that this allegation negated the existence of the requisite conspiracy under Section 1985(3), because only one legal entity, the Association, terminated Novotny. The cause of action under Title VII was dismissed because Section 704(a), its "retaliation" provision, protects only individuals who suffer discrimination because they "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" pursuant to Title VII enforcement. The complaint did not allege that Novotny's termination was connected with any such Title VII proceedings.

The Court of Appeals for the Third Circuit *en banc* reversed the district court regarding both counts

of the complaint. With respect to the alleged cause of action under 42 U.S.C. § 1985(3), the Third Circuit held, *inter alia* that the officers and directors of the Association could form a conspiracy for purposes of 42 U.S.C. § 1985(3), and that an alleged violation of Title VII may be included as a deprivation of "equal privileges and immunities" under Section 1985(3). It is these two holdings that are of particular concern to the *Amicus*, EEAC.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S HOLDING THAT TITLE VII SUBSTANTIVE RIGHTS MAY BE ENFORCED THOUGH SECTION 1985(3) IS CONTRARY TO THE INTENT OF CONGRESS AND THE DECISIONS OF SEVERAL OTHER CIRCUIT COURTS, AND COULD UNDERMINE THE ADMINISTRATIVE AND CONCILIATION PURPOSES OF TITLE VII.

In construing the relationship between Section 1985(3)[1] and Title VII, the Third Circuit below

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[1] 42 U.S.C. § 1985(3) provides in relevant part:

§ 1985. Conspiracy to interfere with civil rights

* * * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class or persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case

recognized that (Pet. App. 61a-62a):[2]

> There is material from which defendants can argue the inapplicability of both statutes to this case. Narrowly construed, either enactment could fall well short of providing the plaintiff a cause of action.

Indeed, in discussing its pivotal conclusions in this case, the Third Circuit acknowledged that it had parted company with the holdings of other circuit and district courts.[3] Until the conflicts created by the decision below are resolved by this Court, the potential liability of corporate officers will remain uncertain and the enforcement of Title VII and Section 1985(3) may be seriously disrupted.

The court below broadly held that language in Section 1985(3) intended to protect "equal protection of the laws," or "equal privileges and immunities under the laws" includes "the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity." (Pet. App. at 28a).[4]

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of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[2] "Pet. App." references are to the appendix to the petition of the Association.

[3] These splits of opinion are discussed more fully below.

[4] The court also candidly stated that its analysis was inconsistent with that of two other courts of appeals. (Pet. App. 24a & n. 47; and 28a n. 55), citing *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504, 507 (4th Cir. 1974); and *McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919, 924-928 (5th Cir. 1977) (*en banc*).

In so holding, the Third Circuit explicitly noted its disagreement with the decision of the Fourth Circuit in *Doski* v. *Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976), that a plaintiff should not be permitted to enforce Title VII rights in a Section 1985(3) suit. (Pet. App. 37a & n. 76). The Fourth Circuit reasoned in *Doski* that such a procedure would be inconsistent with the administrative mechanism established in Title VII. As stated by Judge Craven (539 F.2d at 1334), the court found that Congress

> . . . intended the procedures under [Title VII] to be the exclusive mechanism for effectuating rights created by the statute. We believe that the consistently applied requirement that a complainant cannot entirely bypass the administrative process mandates this result absent expression of congressional intent to the contrary. *See, e.g., Johnson* v. *Seaboard Air Line R.R., supra.* And finding no such indication as to the intent of Congress, we hold that § 1985(3) is not an available mechanism to enforce rights created by Title VII.

The reasoning of the *Doski* decision, however, was completely rejected by the Third Circuit. The significant threat which this conflict poses to the purposes of Title VII justifies and requires the grant of the petition to review the decision below.

The potential problems raised by the Third Circuit's decision are more than of mere academic or passing interest. As a practical matter, they would severely disrupt the statutory scheme devised by Congress to eliminate employment discrimination

by way of Title VII. As this Court has stated, the centerpiece of this scheme is the prompt resolution of discrimination charges through conciliation. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359-60 (1977). In *EEOC* v. *Sherwood Medical Industries*, —— F. Supp. ——, 17 FEP Cases 441, 444 (M.D. Fla. 1978), the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations." Similarly, the Fourth Circuit observed in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977), that the EEOC's "statutory duty to attempt conciliation is among its most essential functions." If Title VII rights may be enforced under Section 1985(3), however, the effect would be to permit plaintiffs in many cases to bypass Title VII procedures designed to promote voluntary and amicable settlements through EEOC-supervised conciliation efforts.

Although the Third Circuit described the remedies provided by Section 1985(3) to be "additional" to those provided by Title VII (Pet. App. 29a), this often would not be the case. Compliance with Title VII's procedural requirements probably would not be a prerequisite for filing a suit under 42 U.S.C. 1985 (3).[5] See *Johnson* v. *Railway Express*, 421 U.S. 464

[5] The substantive provisions of 42 U.S.C. § 1981 should not be confused with those of Section 1985(3). Section 1981 confers substantive rights to individuals to make and enter contracts on the same basis as "white citizens". This right was not withdrawing by the passage of Title VII. *Johnson* v. *Railway Express, supra.* Section 1985(3), however, is a *remedial* statute (Pet. App. 29a). It does not grant any rights but rather incorporates existing "privileges and immunities" to form its substantive content. See *Bellamy* v. *Mason Stores, Inc., supra.*

(1975). The decision of the Third Circuit, therefore, presents employees with an attractive alternative method of enforcing Title VII rights without bothering to comply with some of Title VII's restrictions. For example:

1. Under Title VII, a timely charge must be filed with the Equal Employment Opportunity Commission, within the relatively brief period of 180 days, as a precondition to filing suit. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Section 1985(3) has no such administrative procedure to exhaust before suit is filed, and a plaintiff can utilize a much longer statute of limitations. *See, e.g., Davis* v. *United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (Pennsylvania's statute of limitations for such actions is *six years*).

2. Under Title VII, a plaintiff does not have a right to a trial by jury. *Harmon* v. *May Broadcasting Co.*, —— F.2d ——, 18 FEP Cases 178 (8th Cir. 1978); *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Slack* v. *Havens*, 522 F.2d 1091 (9th Cir. 1975).

3. Under Title VII, there is a two-year statutory limitation on recovery of back pay. See Section 706 (g), 42 U.S.C. § 2000e-5(g).

4. Under Title VII, punitive damages may not be recovered. *Richerson* v. *Jones*, 551 F.2d 918 (3rd Cir. 1977).

Accordingly, unless the decision of the Third Circuit is reversed, Section 1985(3) can be utilized as

an unintended means of enforcing Title VII which would undermine Congress' desire for a prompt and voluntary resolution of employment discrimination claims, and could convert Section 1985(3) into a "general federal tort law," a result frowned upon by this Court in *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 (1971). Indeed, the Third Circuit's decision is unnecessary to assure that Title VII is properly enforced, inasmuch as Congress intended that Title VII would provide the "most complete relief" possible to victims of violations of that statute. See *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[6]

II. THE THIRD CIRCUIT'S HOLDING THAT OFFICERS AND DIRECTORS OF A SINGLE CORPORATION ACTING IN THEIR OFFICIAL CAPACITIES MAY FORM A CIVIL CONSPIRACY FOR PURPOSES OF SECTION 1985(3) CONFLICTS WITH PREVAILING JUDICIAL INTERPRETATIONS AND IMPROPERLY EXPANDS THE SCOPE OF THE STATUTE.

In refusing to affirm the district court's dismissal of the conspiracy allegation, the Third Circuit stated that: ". . . we do not follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3)." See Pet. App. 55a and cases cited at n. 25, especially *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.)[7] This posi-

[6] Cf., *United States* v. *East Texas Motor Freight Systems, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977).

[7] In addition to those cases which the court below cited as contrary to its own decision, see *Girard* v. *94th Street & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Lattimore* v. *Loews Theatres, Inc.*, 410 F. Supp. 1397 (M.D. N.C. 1975); and *Cole* v. *University of Hartford*, 391 F. Supp. 888, 892-893 (D. Conn. 1975).

tion which the Third Circuit refused to adopt is the well established rule in cases alleging a "civil" conspiracy,[8] and other courts have recognized that there is nothing peculiar to a federal civil rights action that would justify special reluctance in applying the same principle to Section 1985(3).[9]

In addition to the several conflicting cases cited in footnote 125 of its decision, the Third Circuit brushed aside decisions under the Sherman Antitrust Act, 15 U.S.C. § 1, which also hold that corporate officers cannot form a conspiracy under that statute. The court's rationale for viewing the antitrust decisions as "a distinct line of precedent" (Pet. App. at 53a and n. 121) was that federal antitrust doctrine is rooted in the tension between fostering competition and not intermeddling unnecessarily in the internal entrepreneurial decisions of companies. No parallel was seen with Section 1985(3) because, while almost all corporate decisions might have an impact on

[8] See *Brown* v. *Frito-Lay, Inc.*, 15 FEP Cases 1055, 1058 (D. Kan. 1976); and *Zelinger* v. *Uvalde Rock Asphalt Co.*, 316 F.2d 47 (10th Cir. 1963). Exceptions to this rule are not present in this case, as there is no assertion that the employer's officers acted in their individual rather than corporate capacities (Complaint, ¶ 33; Pet. App. 83a), and the corporate principal clearly was not created with a purpose of shielding any conspiracy. See *Cole* v. *University of Hartford*, *supra*, 391 F. Supp. at 892-893.

[9] *Cf. Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 463-464.

competitors and thus arguably fall within the antitrust laws, only a "limited number of decisions" would impact on Section 1985(3)'s scope, which includes equal protection, and equal privileges and immunities. (Pet. App. at 54a, n. 21).

This rationale, however, evidences no appreciation of either the scope of the federal equal employment laws or the unrestrained impact of the court's own decision. As noted previously, the Third Circuit reasoned expansively that Section 1985(3) encompasses "the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity." (Pet. App. at 28a). Thus, virtually any corporate action alleged to constitute discrimination on grounds of race, color, religion, sex, national origin, age or handicap could become the basis of a conspiracy suit against the corporation's officers. Some idea of the large number of employment decisions involved may be found in EEOC regulations requiring employers to retain all personnel and employment records having to do with applications for employment, hiring, promotion, demotion, transfer, layoff or termination, and rates of pay. See EEOC: Records and Reports, Subpart C—Record Keeping by Employers, 29 C.F.R. § 1602.14. Additionally, Section 703(h) of Title VII specifically addresses a number of employment areas such as wages, compensation, seniority and merit systems.

Thus, even assuming that the Third Circuit's expansive view of the number of corporate decisions covered by the antitrust laws was not exaggerated, it certainly had no justification for downplaying the extremely broad coverage of the federal equal em-

ployment laws, and the corresponding expansion of Section 1985(3) to cover potentially every corporate employment and personnel decision made by more than one officer.[10]

Accordingly, even if the Third Circuit's conclusion that Title VII and other equal employment statutes fall within the ambit of Section 1985(3) were correct, it does not follow that the conspiracy element of that statute must also be expanded to cover actions taken by corporate officers in their official capacities. To the contrary, the Third Circuit's analysis of the policies underlying antitrust precedent logically impels exactly the opposite result. Because the Third Circuit's decision is both out of step with decisions of other circuits construing the conspiracy elements of Section 1985(3), and is logically contrary to its own view of the rationale justifying a narrow construction of the civil conspiracy requirements of the federal antitrust laws, review of the decision below by this Court is required to clarify important statutory questions and ensure the even-handed enforcement of the federal conspiracy laws.

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[10] Indeed, it is interesting to note the explosion of Title VII court actions relative to those filed under the federal antitrust laws. Thus, in 1977, there were 5,931 district court cases filed under Title VII as compared with only 1,689 antitrust cases commenced in the federal district courts. See 1977 Annual Report of the Director, Administrative Office of the United States Courts, p. 100 (Table 20), and p. 112 (Table 25).

CONCLUSION

For these reasons, and those stated in the petition of the Association, *et al.*, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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